IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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This appeal by American Farm Lines ("AFL") and the companion appeal by the Interstate Commerce Commission in No. 382 bring up for review by this Court a judgment of the court below nullifying orders of the Interstate Commerce Commission awarding AFL temporary common carrier authority to haul Government freight between nine mid- and southwestern states and five western states.

Four motions to affirm the judgment below have been filed on behalf of 56 appellees.[1] AFL respectfully

[1] One motion was filed on behalf of the American Trucking Associations, Inc. and 23 motor carrier appellees (hereinafter "ATA Motion"). Other motions were filed by United Transports, Inc. ("United Motion"), by a group of 27 railroad appellees ("Railroad Motion"), and by a separate group of four motor carrier appellees ("Consolidated Motion").

submits that these motions, which argue the merits of the case at great length—40 pages in one case—wholly fail to sustain the burden imposed upon the movants by Rule 16 of the Rules of this Court to show that the issues presented are insubstantial. On the contrary, these motions clearly demonstrate that the appellees are urging this Court to accept principles of law that have never been accepted by any court other than the court below, and that are in clear conflict with established law. On the basis of these highly technical and novel procedural contentions, the appellees seek immunity from even temporary competition from American Farm Lines in providing transportation service to the United States Government. Accordingly, the motions should be denied.

Significantly, the United States of America, while denominated an appellee in this Court, has not moved to affirm the judgment below. Indeed, the United States has informed the Court that it believes the decision below to be erroneous, that it does not oppose appellants' requests that probable jurisdiction be noted, and that if probable jurisdiction is noted it will support the position of the Interstate Commerce Commission. Memorandum for the United States, p. 2.[2]

It is also significant that on August 21, 1969, an order was entered in this case by Mr. Justice Douglas staying the judgment of the court below pending disposition of the Jurisdictional Statement by the entire Court.[3] As a result of this stay AFL has been permit-

[2] Unless otherwise specified, references herein to "appellees" shall mean only those appellees that have filed motions to affirm and shall exclude the United States.

[3] On July 7, 1969 the ICC's new regulations defining the scope of the agricultural cooperative exemption in the Interstate Commerce Act, 49 U.S.C. § 303(b)(5), became effective. These regulations, 49 C.F.R. § 1047.21, provide that a cooperative may not, under its ex-

ted, pending disposition of the Jurisdictional Statement, to provide the Government with the trucking service that the ICC found to be immediately and urgently needed by the Department of Defense. In staying the judgment below, Mr. Justice Douglas noted that "the jurisdictional statement filed by appellant presents substantial questions."

I. THE QUESTIONS ARE SUBSTANTIAL

Appellees have filed lengthy motions addressed to the merits of the questions raised on the appeal, and reviewing in detail the evidence submitted to the Interstate Commerce Commission.[4] One conclusion must

emption from economic regulation by the ICC, transport freight for nonmembers in excess of 15 percent of the cooperative's total annual interstate tonnage. It was in anticipation of the effectiveness of these restrictions on its ability to serve the Defense Department that AFL applied for common carrier authority and that the Department supported the application. AFL J.S., pp. 6-7, 33a.

Because AFL was prohibited by the judgment below from operating under its temporary authority at the time the new regulations took effect, and because AFL's ability to serve its own members depends so heavily on its ability to provide nonmember service, AFL and its members were threatened with very substantial injury pending this appeal. AFL Application for Stay of Judgment and Order of the District Court Pending Appeal, pp. 9-12. The Defense Department strongly supported AFL's effort to stay the lower court judgment, pointing out that even a temporary loss of AFL's service would result in higher transportation costs to the Government, a lessened capacity to make expedited deliveries of Defense materials, and an increase in the public exposure to the risks of transporting explosives. *Id.* at Ex. 7.

[4] In addition, some of the appellees have engaged in extended discussion of the injunction proceedings to which AFL is a party in the Western District of Oklahoma. These cases, which were described at page 6 of AFL's Jurisdictional Statement, deal only with the scope of the agricultural cooperative exemption *prior* to its amendment in 1968. They have absolutely no relevance to the instant case except insofar as they explain in part why AFL applied to the ICC for a common carrier certificate.

be drawn from these pleadings: the issues presented on this appeal are both substantial and important.

If the decision of the court below is permitted to stand, the result will be to cause a radical and retrogressive change in the nature of ICC temporary authority proceedings. By arguing that the ICC failed to follow its own regulations the appellees have invented an issue that simply is not present in this case. In reality they are contending that the Commission should be forced to modify its present method of processing temporary authority applications. At present the Commission determines whether the proposed service is available from existing carriers not only by considering the applicant's evidence, but also by weighing the statements of protesting carriers as to their own willingness and ability to provide the service.

The import of appellees' argument is that the Commission may not weigh the statements of the protesting carriers until it has first made an evaluation of the "sufficiency" of the evidence offered by the applicant. If the applicant has not provided every bit of information called for by the Commission's outline of the evidence to be submitted by supporting shippers, appellees argue that the application must be denied *even if the record as a whole contains evidence that would support a grant of temporary authority under the statutory standards.*

In short, by attempting to invoke the rule of the *Service* and *Accardi* cases, appellees would have this Court read the Commission's regulations as a limitation imposed by the Commission itself on the exercise of its discretionary powers under section 210a of the

Interstate Commerce Act, 49 U.S.C. § 310a.[5] No court other than the court below has ever accepted this argument. It was rejected recently by this Court in *Estes Express Lines* v. *United States*, 394 U.S. 718 (1969), *affirming per curiam*, 292 F. Supp. 842 (E.D. Va. 1968), and by district courts in *Superior Trucking Co.* v. *United States*, 1969 CCH Fed. Car. Cas. ¶ 82108 (N.D. Ga. 1969), and *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154 (N.D. Ohio 1966). In *Roadway* the district court stated (263 F. Supp. at 159) that the purpose of the temporary authority rules is simply

> to facilitate the Commission's handling of requests for temporary authority. The rules reflect no intention to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority.[6]

In addition, appellees' argument has been rejected without comment in at least one other district court in which it has been raised.[7]

However, the argument continues to endure in cases in which protesting carriers are attempting to upset

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[5] Contrary to appellees' assertion, we do not contend that the ICC may not limit its own power. Consolidated Motion, p. 17. We simply contend that the Commission has never expressed any intention to limit its power to grant temporary authorities through the promulgation of the regulations in issue here.

[6] *See also Superior Trucking* v. *United States*, 1969 CCH Fed. Car. Cas. ¶ 82108, at 54544:

> There is a great deal of doubt whether the regulation in question is binding on the Commission or merely states general guidelines for the Commission's own benefit.

[7] Plaintiff's Reply Brief to ICC Motion to Cancel Further Argument, pp. 10-12, *Hussey* v. *United States*, 271 F. Supp. 650 (N.D. Cal. 1965).

ICC temporary authority orders, and it has been raised in at least two other temporary authority cases that are presently awaiting decision in district courts.[a]

Thus, the legal issue raised by this appeal is clearly of substantial importance. Unless this Court rejects the argument accepted by the court below—as have all other courts in which it has been made—it will continue to form the basis for litigation against the Commission by disappointed protestants in temporary authority cases.

In addition to the importance of the legal questions raised on this appeal for the proper administration of the temporary authority statute, there are important matters of public interest involved. The practical impact of an affirmance of the lower court's judgment would be substantially to eliminate AFL as even a temporary carrier of Government freight, thus depriving the Defense Department of an important capacity for faster, less costly, safer delivery and remitting it to the use of slower and more expensive[b] transportation services involving greater exposure of risk to the public when hazardous materials are being transported.

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[a] Brief of Plaintiffs, pp. 19-24, *Saginaw Transfer Co.* v. *United States*, Civ. No. 2964, E.D. Mich.; Brief for Plaintiffs, pp. 31-36, 46-47, *Bell Lines, Inc.* v. *United States*, Civ. No. 3759, S.D. W. Va.

[b] In the ordinary ICC certification case the cost of the proposed transportation is not a relevant issue, the theory being that the Commission has statutory rate-making powers and is obligated to insure that just and reasonable rates are charged by carriers.

While section 210a of the Interstate Commerce Act, 49 U.S.C. § 310a, does not expressly include cost as one of the determinants of need, it would be entirely reasonable for the Commission to consider cost where service to the Government is involved. Section 22 of the Interstate Commerce Act, 49 U.S.C. § 22 expressly permits free rate competition among carriers in providing service to the Government. Under section 22 carriers may tender rates to the

The vigor with which the Defense Department has supported AFL, not only in its applications for temporary and permanent authority, but in its efforts to stay the judgment of the court below pending this appeal, plainly demonstrates that the Department's need for AFL's service is far more than a casual "preference" for or "interest" in single-line service, as appellees suggest.[10] In an affidavit submitted to both this Court and the court below, Mr. Vincent F. Caputo, the Department of Defense Director for Transportation and Warehousing Policy, the Department's highest-ranking transportation official, stated in part as follows:

> The consequences of AFL's significantly shorter transit time have been enormous, both in terms of insuring the fastest possible delivery of critical war materials and in terms of effecting significant cost savings to the Government. Between December 1966 and the end of March 1969, the use of AFL has saved DOD in direct transportation costs alone $1,062,300. While figures are not available, I believe that this saving, itself substantial, is

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Government that are less than the rates set forth in tariffs that are otherwise generally applicable.

The rates submitted by AFL in its section 22 tenders have been fixed by it acting independently, and not in conjunction with other carriers acting through a conference or other rate-fixing agency. It is clear from protests to AFL's application filed with the ICC that some of the protestants saw AFL as a threat to the existing rate structure. *See, e.g.*, Protest of the Consolidated Freightways Corp. of Del., p. 3 (R. 511). (Consolidated believes AFL will pursue "rate-cutting policy if this application is granted"); Protest of Tri-State Motor Transit Co., p. 3 (R. 1187) Tri-State believes Defense Department purpose is "to create an unregulated rate war").

[10] *See* Railroad Motion, p. 8; ATA Motion, p. 8.

> vastly overshadowed by the indirect systems savings—that is, such savings as warehousing and inventory costs—that direct single-line service makes possible.
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> * * *
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> . . . To require a temporary cessation of AFL's service during this interim period would reduce DOD's ability to achieve expedited delivery of critical materials, would substantially increase the cost to DOD and the taxpayers of moving defense traffic, and would deny the public the additional safety benefit of reduced . . . road mileage [in the transportation] of hazardous commodities.

AFL Application For Stay of Judgment and Order of the District Court Pending Appeal, Ex. 7, pp. 3, 5.

A. The ICC Did Not Violate the Service-Accardi Rule

In its Jurisdictional Statement AFL stated that the first question raised by this appeal was whether the court below failed to apply the proper scope of judicial review in nullifying the ICC's orders for supposed non-compliance with ICC regulations, when the record contained evidence supporting the Commission's decisions. Both the ICC and the United States are in substantial agreement with this formulation of the issue. ICC J.S., p. 4; Memorandum for the United States, p. 2.

Appellees disagree with this statement of the issue however.[11] Instead, they see this appeal as raising

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[11] There appears to be no significant difference among the parties with respect to the second question stated by AFL, namely, whether the ICC had jurisdiction to reopen the administrative record to receive additional evidence after a judicial review proceeding had been commenced.

solely the question whether the ICC was required to follow its own regulations—a question they believe to be answered affirmatively by this Court's landmark decisions in *Service* v. *Dulles,* 354 U.S. 363 (1957) and *Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954), and the progeny of those cases.

The charge that an administrative agency has failed to follow its own regulations has certain superficial appeal, carrying with it the suggestion of administrative arbitrariness. But despite appellees' ingenious efforts to tug this case within the boundaries of the *Service-Accardi* rule, it is perfectly clear that that precept has no application whatsoever to the facts presented here. The primary issue remains the question of the proper scope of judicial review: Did the court below judge the agency's decision by the proper standards?

The "rules" supposedly ignored by the Commission in this case were the requirements that the statement submitted in support of AFL's application indicate whether the Defense Department had requested the proposed service from other carriers, and, if so, to identify carriers who had failed or refused to provide the service. 49 C.F.R. §§ 1131.2(c)(8) and (9). As we will show below, the whole thrust of the Defense Department statement of support was that the Department knew of no existing service that was qualitatively equal to AFL's service. We believe this was a fair and substantial response to items (8) and (9). At any rate, in order to determine whether the statement did comply with the rules it would have been necessary for the ICC to make a preliminary analysis and evaluation of AFL's evidence. The charge that the Commission failed to follow its rules, therefore, can only

mean either (1) that the Commission failed to make a preliminary determination whether the Defense Department statement provided a sufficient answer to items (8) and (9), or (2) that the Commission erroneously determined that the Department's statement did provide a sufficient answer. In either case, the appellees' argument must be rejected.

1. ***The Commission was not required to make a preliminary evaluation of AFL's evidence.*** The fallacy in appellees' contention that the ICC was required to make a preliminary evaluation of the sufficiency of AFL's evidence lies in its implicit analogy to formal judicial proceedings. The purport of the argument is that upon the submission of an applicant's supporting statements protestants may, in effect, move for a dismissal of the application for failure to make out a prima facie case.[12]

While the ICC may have discretion to establish such a procedure, it clearly did not do so in its temporary authority regulations. The regulations simply provide a two-stage process of submitting information. First, the applicant files an application accompanied by a supporting statement from the shipper. 49 C.F.R. §§ 1131.2(b) and (c). A summary of the authority sought by the application is then published in the Federal Register, and interested parties are given 15 days in which to file protests. The only information called for in the protest is a specific statement by the protest-

[12] Indeed, most of the appellees have frankly conceded that their claim relates to the sufficiency of the applicant's evidence. As stated in the ATA Motion, p. 7, "AFL failed to meet its statutory burden of proof." And as United Transports frames the issue (United Motion, p. 3), "Failure to comply with the prescribed criteria simply results in a failure to provide a basis in proof." The "failure-to-follow-rules" epithet thus serves only to obscure the true issue.

ing carrier "as to the service which such protestant can and will offer." 49 C.F.R. § 1131.3(a). No provision is made for the filing of a reply by the applicant to the protests filed against the application.

The regulations thus establish a summary procedure in which cross-examination and direct reply and rebuttal are not contemplated, and under which protests may be framed solely in reference to the Federal Register summary of the temporary authority sought. The essence of the procedure is that the Commission, in its expert judgment, weighs the gravity of the need asserted by the shipper and evaluates the capability of protesting carriers to serve that need. If errors in judgment are made by the Commission in granting temporary authority, their impact is ameliorated by the relatively short duration of the authority and by the opportunity to employ more refined fact-finding procedures in considering a corresponding application for permanent authority, such as that of AFL presently under consideration.

As appellees themselves concede, a supporting statement would be in full compliance with the Commission's rules if it stated that the shipper had made no efforts to obtain the proposed service from other carriers. Consolidated Motion, p. 26, n. 24. Such a response might be given if there were in fact no comparable service, or if the shipper was simply of the belief that there was no comparable service available. In either case the Commission would still be required to find as a matter of fact that there was no comparable service available, and if the protesting carriers were able to demonstrate that they were willing and able to provide the service, the application would undoubtedly be denied. Similarly, the fact that a shipper states that it has made unsuccessful efforts to obtain service is not dispositive of the matter. The Commission could

still find, on the basis of the protestants' evidence, that service was in fact available.

In short, haggling over the "sufficiency" of the supporting statement would serve only to make these procedures, which were designed to be summary in nature, more cumbersome.[13] Moreover, such a preliminary evaluation would bear no necessary relation to the resolution of the ultimate statutory questions that must be answered by the ICC. Indeed, as appellees themselves make clear, the procedure could easily result in the Commission's action on a temporary application being nullified notwithstanding the fact that the record was replete with evidence supporting the ICC's grant of authority, and quite irrespective of whether any party had been disadvantaged. Consolidated Motion, p. 19.[14] While appellees are understandably discom-

[13] Moreover, if a protestant is entitled to challenge the sufficiency of the supporting statement, an applicant would presumbly be entitled to challenge the "sufficiency" of a protestant's compliance with the requirement that the protest state specifically the service that the protestant can and will offer. A protest such as that filed in this case by the American Trucking Associations, Inc. would then clearly be stricken. ATA appeared as a representative of "all types of motor carriers of property", and its protest is barren of any reference to the service its members could or would offer. (R. 1517-24)

[14] The only authority cited by appellees for this somewhat startling proposition is a 1965 opinion of the Court of Claims. *Camero* v. *United States*, 345 F. 2d 798. *Camero* does not stand for such a sweeping principle, however. In that case the court found that substantial evidence existed to support an Army decision to discharge a civilian employee. The court raised the possibility, however, that the military prosecutor in the grievance proceeding leading to the discharge may have participated in the decision of the proceeding itself, to the employee's obvious prejudice and in violation of regulations requiring a separation of functions. The instant case involves no comparable challenge to the integrity of the decision-making process.

fited by use of the phrase, it is thus patent that their proposal is indeed a pointless exaltation of form over substance.

Finally, it is beyond dispute that the identical argument raised by appellees was soundly rejected in the *Estes* case, not only by the district court, but by this Court as well. *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 (1969). The district court in *Estes* made it perfectly clear that the regulations do not require a shipper to make and catalogue meaningless requests for service it clearly believes to be unavailable or qualitatively unequal to service it is about to lose. Moreover, the court held that whether or not supporting statements expressing such a belief are sufficiently particular to comply with items (8) and (9),

> the Commission could consider the statements . . . in the light of the failure of the carriers to allege facts showing that they were providing transportation comparable in all respects to [applicant's].

292 F. Supp. at 844. On appeal to this Court it was again argued that the supporting statements had failed to comply with the regulations[15] and that argument was summarily rejected. This disposition was perfectly consistent with the established rule that if, upon a review of the entire record before the ICC, there is *any* evidence tending to show that the application proposes a service for which there is an immediate and urgent need that cannot be met by other carriers, the Commission's decision must be upheld. *Roadway Ex-*

[15] Jurisdictional Statement, p. 8, Appellants' Reply to Motions to Affirm, p. 7, *Estes Express Lines* v. *United States*, 394 U.S. 718 (1969).

press, Inc. v. *United States,* 263 F. Supp. 154 (N.D. Ohio 1966); *Bowen Transports, Inc.* v. *United States,* 116 F. Supp. 115, 120 (E.D. Ill. 1953).

2. *The Defense Department statement substantially complied with the ICC rules.* A fair reading of the Defense Department statement clearly shows that it substantially complied with the ICC's rules—and particularly with items (8) and (9), which call for information concerning efforts to obtain service from other carriers.[16]

In evaluating this statement, it is important to keep in mind that items (8) and (9) do not themselves require an applicant to *make* efforts to obtain the service from others. They simply ask whether such efforts have been made and, if so, what the results were. Thus, as appellees concede, a carrier who simply stated that it had made no such efforts because it knew of no one able to provide comparable service would be in full compliance with these regulations. Consolidated Motion, p. 26, n. 24. If such an answer were given the only issue remaining would be the ultimate question posed by section 210a of the Interstate Commerce Act, namely, whether comparable service was in fact available.

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[16] Neither of the appellants has argued, as appellees suggest they did, that the ICC may or did waive its rules in this case. Consolidated Motion, pp. 19-20. The Commission's Jurisdictional Statement merely noted that the impact of the lower court's decision—rejecting as an inadequate response to items (8) and (9) the Department's statement to the effect it knew of no service qualitatively equal to AFL's—was to require the shipper to perform the futile gesture of asking for service it could not get—a requirement the the ICC has not itself imposed. ICC J.S., p. 9.

The Department's statement shows that, based upon its extensive experience[17], it viewed AFL's service as qualitatively different from the service available from existing carriers, and that it had been relying on AFL for almost two years to fill a specialized need. Since late 1966, when the Department first began to use the highly flexible service available from farm cooperatives, it has relied upon AFL "for movement of traffic that requires expedited movement and precisely-timed delivery." Where these peculiar needs have not been present it has relied on "the more rigid service available from certificated carriers." AFL J.S., pp. 30a, 31a. In this sense the Department viewed AFL's service as a "complement" to existing service.

The statement pointed out, again in the Department's view and based upon substantial experience, that three features distinguish AFL's service and enable AFL to meet the Department's needs for expedited deliveries: First, AFL operates between the territories involved on a single-line basis, whereas most service available from other carriers requires joint-line participation by two or more carriers. AFL J.S., p. 22a. Second, virtually all other carriers are required to follow prescribed highway routings, set forth in their certificates, whereas AFL provides direct, point-to-point service. AFL J.S., p. 23a. Third, AFL uses two-man driver teams and does not change power units from origin to destination AFL J.S., pp. 23a, 31a.

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[17] The experience of the Defense Department obviously dwarfs that of all other shippers in the United States. In fiscal year 1968 (the last full year for which figures are available), the Department shipped 64 billion pounds of material at a cost of $599 million. These figures do not include contract air shipments and the movement of household effects. DOD, Military Traffic Management and Terminal Service, Quarterly Progress Report, Third Quarter FY 1969, p. 8.

The practical significance of these differences for those responsible for scheduling shipments of defense materials was clearly stated: Where joint-line, regular-route service is involved, the Department allows 24 hours transit time for each 300 miles of distance to the destination; however, where single-line, regular-route service is available, the Department computes transit times on the basis of 8 hours for each 300 miles. AFL J.S., pp. 22a-23a.

The foundation for the Department's statements concerning its experience with transit times is clearly set forth. In one 11-month period alone the Department shipped a total of 1.9 billion pounds of freight between the territories covered by the application, consisting of thousands of different commodities. AFL J.S., p. 21a. During a 19-month period that overlapped this 11-month period, the Department shipped over 74 million pounds of freight on AFL vehicles. AFL J.S., p. 31a. Thus, the Department's statements did not represent casual or frivolous conclusions; they reflected a vast experience in the transportation of goods by motor carrier.

The Department set forth a number of specific examples of instances when AFL had provided expedited deliveries that could not, to the best of the Department's knowledge and based upon its experience, have been provided by other carriers. AFL, J.S., pp. 31a-32a. In addition, it set forth in detail a tabulation of the major Defense Department origin and destination points between which there was not, to its knowledge, any carrier authorized to provide direct, single-line service. AFL J.S., pp. 25a-27a. This list identified more than 30 pairs of specific points in the territories covered by the application between which no single-line service was available. Furthermore, it iden-

tified more than a dozen additional points from which no single-line service whatsoever was available to *any* point in one or more of the territories AFL proposed to serve.

Finally, the Department made clear that it was already using AFL's service and had been using it since late 1966. AFL J.S., p. 30a-31a. Indeed, the primary reason for its support of the application was that it was faced with a substantial *loss* of AFL's service by reason of new legislation narrowing the agricultural cooperative exemption and because of the injunctions procured by competing carriers. Because AFL's service had been available to it and because AFL had satisfied the Department's requirements for expedited service during this time (AFL J.S., p. 31a), there was obviously no occasion for the Department to have called upon other carriers to perform this service.

In short, the Department's response to items (8) and (9) was as follows: The Department has a substantial need for expedited service.[18] For almost two years AFL has been meeting that need through its provision of single-line, point-to-point service. The Department is now threatened with a substantial diminution of that service. Based upon the Department's experience as a shipper of vast quantities of goods, both prior and subsequent to the advent of AFL's service, and based also upon its knowledge of the operating authorities of other carriers, it believed that no service qualitatively

[18] It should be noted that the lower court did not fault the Department's statement insofar as it was addressed to the issue of the need for the service. Accordingly, this appeal raises no question with respect to that portion of the statutory standard. The decision below was based solely upon the statement's supposed failure to provide information relating to the availability of that service from other carriers.

comparable to AFL's was available from other carriers. That such a response was sufficient to comply with items (8) and (9) is established by this Court's decision in *Estes,* and was clearly recognized by the ICC itself. In its order granting temporary authority it expressly noted that AFL "knows of no carrier in a position to meet its needs." AFL J.S., p. 36a. It would be unreasonably technical to hold that compliance with items (8) and (9) required more than this.

If the Department's conclusions were erroneous and comparable service was in fact available from other carriers, it was well within the ability of the protestants to establish this by their own evidence. However, as the Commission found, "there is nothing in the record to establish that any of the protesting carriers provide a service to meet the Defense Department's needs." AFL J.S., p. 36a. It was through no oversight or inability to respond that the carriers failed to establish their case. They failed to do so because they could not do so; they failed simply because they are not able to provide service comparable to that of AFL.

This case is markedly similar in this respect to the *Estes* case. In *Estes,* as here, the supporting shipper was already being served by the applicant at the time the application was filed. In each case, therefore, there was no occasion for the applicant to have called upon other carriers for the service. In *Estes,* as here, the shipper was faced with an imminent curtailment of service, and in each case the shipper expressed the view that no other carriers could provide service of equivalent quality and scope. In *Estes* the lower court held that the shipper's explanation of these circumstances reasonably answered items (8) and (9), and this Court affirmed summarily. The present case cannot be reasonably distinguished.

3. *Appellees suffered no prejudice.* Even if the Defense Department statement failed to provide the information called for by items (8) and (9), that failure could not conceivably prejudice appellees.

Appellees have deftly attempted to read into the ICC regulations relating to supporting shipper statements a purpose "to insure that . . . protests in rebuttal of the applicant's case can be framed with specificity." Consolidated Motion, pp. 6, 16. But the Commission itself has made it clear that no such purpose was intended. Its policy statement with respect to these regulations indicates that the regulations were designed solely to facilitate processing of temporary authority applications by the ICC staff. *See Acme Cartage Co.* v. *United States,* 290 F. Supp. 453, 457 n.4 (W.D. Wash. 1968). The Commission pointed out that prior to the adoption of the regulations many applications failed to provide adequate information and further investigation by the staff was often required. *Ibid.*

Protection for the interests of competing carriers was provided in the regulations *not* by giving them a right to frame specific rebuttals to applicant's evidence, but by providing them an opportunity to state with specificity what service they themselves can and will provide. 49 C.F.R. § 1131.3(a) (2). As noted above, the regulations contemplate that the protest may be framed solely in response to the Federal Register summary of the operating authority sought by the applicant. When protests are filed setting forth the service the protestant is willing and able to provide, in conformity with the regulations, the Commission is in a position to make a judgment whether the proposed service is in fact available from existing carriers.

Further protection for protestants is provided in the opportunity for judicial review under the settled

standards applied by reviewing courts in temporary authority cases. As one district court pointed out very recently, in rejecting the identical arguments made by appellees in the instant case,

> There can be no prejudice to the plaintiffs from the Commission's alleged failure to follow subsections (8) and (9), since there is some evidence in the record to support the Commission's decision.

Superior Trucking v. *United States,* 1969 CCH Fed. Car. Cas. ¶ 82108, at 54545 (N.D. Ga. 1969).

Appellees' plaintive argument that they were denied an opportunity to frame specific rebuttals to applicants' evidence is therefore meaningless. They were given precisely the opportunity the Commission's regulations contemplated that they should have—the opportunity to state what portion of the service for which AFL sought authority they were willing and able to furnish. Moreover, they took full advantage of this opportunity; as appellees admit, they "adduced a considerable body of evidence," and their evidence, taken with AFL's evidence, "presented questions of fact." Consolidated Motion, pp. 9, 25. The record before the ICC was 3,500 pages in length. (R. 506-4003). Appellees simply failed to make a showing on that record that convinced the Commission that they could provide the service. The only prejudice they suffered resulted from the inadequacy of the evidence they adduced.[19]

Finally, appellees claims of prejudice resulting from alleged technical procedural deficiencies must be

[19] In the permanent application proceeding, which is now pending, appellees have had and will have ample opportunity not only to submit their own evidence, but also to cross-examine and rebut AFL's evidence. Indeed, in June 1969, at the opening session of oral hearing on AFL's permanent application, AFL's witnesses were cross-examined by the protesting carriers continuously over a six-day period.

weighed against the fact that in this case they are seeking to be relieved from even temporary competition. This is not a case like *Service* or *Accardi* or *Vitarelli*, where individuals were deprived of their livelihood in accusatory proceedings. It is a case involving broad economic issues and questions of national transportation policy, in which a national trade association and a group of large commercial corporations are engaging in a concerted effort to prevent the entry of a new competitor, even temporarily. Against this background, claims of minor procedural irregularities in a proceeding resulting in only a temporary licensing of the feared competition ring hollow indeed.

B. The Filing of the Complaint in This Case Did Not Oust the Commission's Jurisdiction

The underlying flaw in appellees' arguments with respect to the propriety of the reopening of the administrative record lies in their contention that the agency proceeding had been ended at the time the complaint was filed and interlocutory relief was sought in the court below. The substance of their position is that because the ICC had completed its consideration of the matter, it acted "inconsistently" with the district court's jurisdiction in proceeding after the court entered its stay of the Commission's order.

In fact, under the circumstances of this case there was absolutely no such inconsistency, as many of the appellees themselves recognized. At the time the complaint was filed the ICC had not completed its proceedings because the appellees themselves had asked the Commission to reconsider its decision. It had refused, however, to stay the effectiveness of AFL's temporary authority. Thus, while the Commission's order was not yet ripe for judicial review on the merits, because of the pending petitions, it may reasonably be concluded that appellees had exhausted their administrative rem-

edies insofar as interlocutory relief was concerned, and that an immediate effort to obtain such relief in court, pending final action by the ICC, was appropriate.

A brief review of the facts is necessary in order to place appellees' jurisdictional argument in proper perspective:

The ICC's first order granting temporary authority to AFL was entered on September 3, 1968, and served on September 5, 1968. AFL J.S., p. 15a. Beginning as early as September 12, 1968, a number of the protesting carriers filed petitions for reconsideration of the Commission's September 3 order.[20] In addition, a number of protestants asked that the effective date of AFL's temporary authority be postponed pending final action by the Commission on the petitions.[21] However, between September 12 and 19 the Commission entered orders denying these requests to stay the effectiveness of the temporary authority (R. 1732-35), and it became effective on September 16, 1968. (R. 57)

Appellees were thus faced with an obvious dilemma. While many of them had sought to have the ICC overturn its own order of September 3, the Commission had not yet acted upon their petitions. Yet AFL's temporary authority had become effective, and AFL was

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[20] Most of the original plaintiffs in this case filed such petitions:

Carrier	*Date Petition for Reconsideration Filed*
Black Ball Freight Service	September 13 (R. 2499)
Consolidated Freightways Corp.	September 15 (R. 2513)
D.C. International, Inc.	September 20 (R. 2621)
Garrett Freightlines, Inc.	September 23 (R. 2637)
Navajo Freight Lines, Inc.	September 15 (R. 2529)
Pacific Intermountain Express Co.	September 20 (R. 2626)
Riss & Co.	September 24 (R. 3521)
Western Gillette, Inc.	September 19 (R. 2588)

[21] R. 2478, 2480, 2487, 2513, 2553.

free to commence operations. Appellees elected to resolve their dilemma by filing suit against the Commission and simultaneously seeking interlocutory relief against the continued effectiveness of the order. Accordingly, on September 26, 1968 a complaint and a motion for a stay of the Commission order were filed in the court below. (R. 1, 11).

On October 2, 1968 the court below granted a stay of the effectiveness of the ICC order (R. 82), and on October 9, in response to the stay, the Commission entered an order postponing the effectiveness of its own order of September 3. Although the ICC, in opposing the stay, had expressly called to the court's attention the fact that some 60 petitions for reconsideration were still pending before it (R. 57),[22] it is significant that the court did not in any way forbid the ICC from continuing to consider these petitions. Indeed, on October 6, 1968, following entry of the court's order, three additional carriers petitioned the ICC for reconsideration of its September 3 order.[23]

Replies to the petitions for reconsideration were filed both by AFL and the Defense Department. On November 5, 1968 the ICC issued an order expressly acknowledging both the entry of the district court's stay order and the filing of appellees' petitions for reconsideration. AFL J.S., p. 40a. It noted, moreover, that the Department's reply had raised additional arguments in support of the application, and that the appellees had not yet had an opportunity to reply to these contentions. Accordingly, it ordered that the record be reopened in order to permit the submission of sworn evidence on these issues. The Commission's

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[22] The Commission's brief in opposition to the stay clearly informed the court that the Commission's Rules of Practice, 49 C.F.R. § 1100.101(g) permitted the filing of such petitions. (R. 57)

[23] R. 3587, 3595.

order expressly noted that in view of the district court's stay order, the effectiveness of AFL's temporary authority continued in suspension. AFL J. S., p. 41a.

It is obvious, therefore, that the ICC did not act in disregard of the lower court's order. There was, moreover, absolutely no inconsistency between the preliminary exercise of jurisdiction by the court below and the continued consideration of the pending petitions by the Commission. In practical effect, the only way appellees could have secured interim relief from the injury they were alleging was by invoking the court's jurisdiction prior to completion of the agency proceeding. Such a procedure has long been sanctioned by this Court. See *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290 (1923).

Indeed, the appropriateness of continued consideration by the Commission was recognized by the appellees themselves. Their petitions for reconsideration on the merits were filed *after* the ICC had refused to stay its order, and only a few days before they filed their lawsuit. Had they truly believed that the Commission was disabled from proceeding, it would have been a simple matter for them to request the district court not only to stay the effectiveness of AFL's authority, but to stay further proceedings pending judicial review. They did not do so, however. Instead, many of them continued to participate in the ICC proceedings without a murmur of objection.[24] On November 1, 1968,

[24] Some appellees admittedly argued to the Commission that it was without jurisdiction. On October 30, 1968, for example, such contentions were advanced on behalf of Black Ball, Consolidated and Garrett. (R. 3638). However, none of these parties made any effort in the lower court to prevent the Commission from continuing the proceeding.

It is noteworthy that appellees did not even bother to file the record of the ICC proceeding with the court until January 24, 1969 —well after the ICC had acted to reopen that record and had rendered its decision based upon the reopened record.

for example, appellee Tri-State Motor Transit Co., argued that if the Commission decided to reopen the record it should only do so after setting the matter for oral hearing. (R. 3671) Similarly, in response to the petitions of AFL and the Defense Department filed in mid-October, seeking a reopening of the record, the American Trucking Associations, Inc. filed a lengthy opposition devoid of any suggestion that the ICC lacked power to proceed further. Indeed, ATA's pleading renewed its earlier motion to strike certain evidence from the record (R. 3705), thus clearly indicating its acceptance of the Commission's jurisdiction.

Appellees now attempt to extricate themselves from their obviously awkward position by arguing that their own petitions for reconsideration were unauthorized and erroneously filed,[25] and therefore the ICC decision of September 3, 1968 was fully ripe for review when the complaint below was filed. Such a contention—which apparently occurred to appellees only after AFL had replied to the appellees' petitions for reconsideration and had itself asked the ICC to reopen the record (see, *e.g.*, R. 3639)— might warrant considera-

[25] Appellees' argument is strained indeed. While apparently conceding that Rule 101(g) of the Commission's General Rules of Practice on its face permits petitions for reconsideration, they contend that the General Rules were superseded by the Commission's later-adopted rules relating to temporary authorities. Consolidated Motion, p. 39, n. 33. There are two difficulties with this position: First, the ICC itself has stated that Rule 101(g) permitted the filing of these petitions. (R. 57) It cannot seriously be argued, therefore, that the Commission intended to supersede this rule. Second, the temporary authority rules themselves expressly provide for the filing of petitions for reconsideration "pursuant to and in accordance with the Commission's General and Special Rules of Practice." 49 C.F.R. § 1131.6(a). Thus, far from superseding Rule 101(g) of the General Rules when it adopted the temporary authority rules, the Commission expressly incorporated it.

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The undesirable results of an affirmance of the lower court's decision are manifold: It would encumber the ICC's consideration of temporary authority applications with procedures that are not only inconsistent with the summary nature of such cases, but wholly unnecessary for the protection of the rights of protesting carriers; it would provide—and has provided—additional bases for attacking Commission orders in court, thus encouraging litigation in an area where Congress intended the agency to have wide discretion; it would deprive the Department of Defense of a service that is faster, safer, and less expensive than that which the Department has been using since December of 1966, and that was found by the ICC to be immediately and urgently needed.

The substantiality and importance of the issues is thus evident. As AFL suggested in its Jurisdictional Statement, summary disposition of this case would only be appropriate if that disposition were a reversal of the court below. The lower court's decision was clearly erroneous, as is recognized by appellee United States in its Memorandum and as is conclusively shown by this Court's summary disposition in the *Estes* case. It is amply clear, moreover, that the Defense Department statement substantially complied with the ICC's rules, and that this statement, taken together with appellees' own protests, provided a sound basis for the Commission's statutory findings that AFL should be granted authority to provide an immediately needed service that is unavailable from other carriers.

Appellees' motions have argued the merits of the appeal in detail, and AFL respectfully urges the Court to reverse the judgment below on the pleadings now before

the Court and to direct the entry of judgment for appellants.[26]

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[26] Appellees have conceded that if this Court accepts jurisdiction it may appropriately consider the question whether there was evidence in the record to support the Commission's decision on the merits. Consolidation Motion, p. 3 n.2. The parties thus are in agreement that there is no need to remand for further proceedings in the event the Court reverses the court below. AFL submits that the Commission's decision can properly be sustained solely on the basis of the Defense Department statement. It should be noted, moreover, that AFL's evidence also included a 210-page analysis of the operating authorities of the leading protestants. (R. 1761-1970) This analysis showed in detail how cumbersome and inefficient the existing pattern of interconnecting carriers actually is. On these grounds AFL urges summary reversal.